

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
RANDE KUMMER and NATIONAL
FOOD CORPORATION,

Appellants,

v.

SPOKANE COUNTY AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB Nos. 84-249, 84-250,
84-251, 84-252, 84-253,
84-254, 84-255, 84-259,
84-260, 84-261, 84-262,
84-263, 84-264, 84-265,
and 84-273

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a regulatory order and of seven notices of violation and seven \$250 civil penalties for alleged violations of state and local odor control regulations came on for informal hearing before the Pollution Control Hearings Board on March 7 and 8, July 2 and 3 in Spokane, Washington, and July 10 and 12, 1985, in Lacey, Washington.

Seated for and as the Board on March 7 and 8 were Lawrence J. Faulk (presiding) and Gayle Rothrock. Seated for and as the Board on July 2, 3, 10, and 12, 1985, were Lawrence J. Faulk (presiding) and

1 Wick Dufford. The Board visited the site on July 3, 1985.

2 Both Mr. Dufford and Ms. Rothrock have availed themselves of the
3 hearing record for the days when they were not present.

4 The proceedings were officially reported by Robert H. Lewis &
5 Associates and Denise Micka. Respondent elected an informal hearing
6 pursuant to RCW 43.21B.230.

7 Appellant National Food Corporation was represented by attorney
8 Brian Bookey. Appellant Rande Kummer was represented by Attorney Dale
9 Russell. Respondent Agency was represented by its attorney Edward
10 Parry.

11 Witnesses were sworn and testified. Exhibits were examined. From
12 the testimony heard, exhibits examined and the contentions of the
13 parties, the Board makes these

14 FINDINGS OF FACT

15 I

16 Respondent SCAPCA pursuant to RCW 43.21B.260, has filed with this
17 Board a certified copy of its Regulation I, and all amendments
18 thereto, which is noticed.

19 II

20 Rande Kummer is a farmer who grows crops on about 200 acres near
21 Deer Park, Washington, specifically in the South half of Section 9 and
22 the North half of Section 16, Township 28, Range 43, E.W..M. all in
23 Spokane County. He leases this land from the Department of Natural
24 Resources. He receives a salary from a family-held corporation called
25 Right Angle Registered Holsteins, Inc. The area around Kummer's

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 leased land is predominantly a farming/rural area. Some suburban type
2 residential development is, however, beginning to occur in the
3 neighborhood.

4 III

5 National Food Corporation is a corporation operating an egg
6 production facility consisting of approximately 180,000 chickens near
7 Deer Park, Washington. This installation, known as Farm Number 2,
8 generates large amounts of chicken manure suitable for use in
9 agriculture. The chicken farm is about three miles from Kummer's
10 leased property and in a slightly more built-up neighborhood.

11 IV

12 In 1984, National Food Corporation switched this farm from a wet
13 manure system to a dry manure system. Then in the early spring of
14 1984, Rande Kummer and National Food Corporation reached an agreement
15 whereby National Food Corporation would dispose of its daily output of
16 dry chicken manure (approximately 18 yards) by transporting it to
17 Kummer's leased acreage for his use as agricultural fertilizer.

18 V

19 During the spring of 1984, approximately 100 loads of dry chicken
20 manure were delivered to Kummer's leased land. He proceeded initially
21 to spread and plow this manure into the soil. However, when the crops
22 were planted on this land, that method of immediate disposal became
23 unavailable.

24 VI

25 As the chicken manure continued to be delivered, appellant Kummer

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 began to stockpile the material. There were four sites where the
2 material was stored. Three sites were in Section 16 and one site was
3 located in Section 17 on land controlled by another farmer. As the
4 summer progressed and the chickens continued their inexorable habits,
5 the stockpiles became huge.

6 VII

7 Site one was located in Section 16 close to Perry Road and
8 consisted of a pile of manure about 128 feet long, 21 feet wide and 3
9 feet deep. Sites two and four were located close together in an area
10 of Section 16 three-quarters of a mile from the Perry Road at a lower
11 elevation. These sites consisted of two piles of manure, 300 to 400
12 feet long, 3 feet deep and approximately 20 to 25 feet wide. Site
13 three was located in Section 17, three-quarters of a mile west of
14 Perry Road and consisted of a pile of chicken manure 195 feet long, 20
15 feet wide and 2 to 3 feet deep.

16 VII

17 In the afternoon of September 5, 1984, acting on complaints of
18 odors from neighbors who live on Perry Road near site one, an Agency
19 inspector visited and spoke with the complainants.

20 As a result of this inspection, notices of violation Nos. 3579,
21 3580, and 3581 and three civil penalties of \$250 each were issued on
22 September 12, 1985--one penalty for the odors from each separate pile
23 of manure at sites one, two and three. These notices and penalties
24 were appealed to this Board on September 20, 1984, and became our
25 cause numbers PCHB Nos. 84-249, 84-250, 84-251, 84-259, 84-260, and
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 84-261.

2 VIII

3 In the afternoon of September 11, 1984, acting on complaints of
4 odors from neighbors who live on Perry Road near the Kummer's leased
5 land, respondent Agency's inspector visited and spoke with the
6 complainants. SCAPCA's inspector noticed a new pile of manure (site
7 four) in the same general area as site two in Section 16.

8 As a result of this inspection, notices of violation Nos. 3582,
9 3583, 3584, and 3585, and four civil penalties of \$250--one for each
10 pile of manure--were issued on September 12, 1984. These notices and
11 penalties were appealed to this Board on September 20, 1984, became
12 our cause numbers PCHB Nos. 84-252, 84-253, 84-254, 84-255; 84-262,
13 84-263, 84-264, and 84-265.

14 IX

15 On September 12, 1984, along with the Notices of Violations and
16 penalties, SCAPCA issued an order to both appellants. The order
17 demanded:

18 Per the authority of RCW 70.94.141 and SCAPCA
19 Regulation I, Article II, the following actions must
be taken:

- 20 1. No more manure shall be delivered to the four
21 stockpiles described in the attached Notices of
Violation which are on land leased by Randy
22 Kummer, and no new stockpiles shall be started.
- 23 2. The manure that is presently stockpiled on land
24 leased by Randy Kummer shall be promptly spread
and plowed into the soil. This spreading and
25 plowing must begin no later than Thursday,
26 September 13, 1984, and be completed by Thursday,
September 20, 1984.
- 27 3. Spreading and plowing must be done
simultaneously. No areas spread with manure may
be left unplowed.

1 National Food Corporation is responsible for insuring
2 that all persons receiving manure from their farms
3 can adequately handle and dispose of this material
4 using accepted agricultural practices. Stockpiling
of chicken manure is not acceptable. Prompt
spreading and tilling this material into the soil is
the most acceptable disposal method.

5 On October 11, 1984, appellants appealed this order to this Board
6 and it became our cause number PCHB No. 84-273.

7 X

8 The civil penalties were issued by SCAPCA's executive director.
9 Prior to issuing them, he consulted by phone with Dr. Ronald E.
10 Hermanson, a professor in the Department of Agricultural Engineering
11 at Washington State University and a recognized expert in manure
12 management.

13 From this conversation, the executive director received the
14 impression that Dr. Hermanson thought the manure stockpiling being
15 conducted by Kummer was not a good agricultural practice.

16 XI

17 On September 13, 1984, responding to SCAPCA's order, Rande Kummer
18 began ploughing the manure from site one into his north field.
19 Conditions were not ideal for this operation. The weather was hot;
20 the soil was dry and could not absorb the manure. The effect was to
21 create a great cloud of manure-laden dust, which again the neighbors
22 failed to appreciate.

23 Later in the month, Kummer moved the manure from site three to his
24 leased property and also ploughed it into his north field. Manure
25 deliveries, however, were not stopped and he continued to stockpile

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 the manure. The pile at site four was the result of the new
2 deliveries.

3 The huge piles at sites two and four remained until the following
4 spring.

5 XII

6 The complaining witnesses testified at length that the odors on
7 the days in question were sickening, nauseous and persistent. They
8 stated that the odors permeated their clothes, their homes, their
9 cars. They described them as sufficiently offensive as to cause them
10 to avoid being out of doors using their yards. Appellants did not
11 contend that the effects experienced on the dates in question did not
12 occur. Neither did the appellants show that any of the complainants
13 nor the inspector possessed idiosyncratic sensibilities.

14 The Board, therefore, finds on the record before it, that the
15 odors complained of were, in fact, offensive to persons of normal
16 sensitivity and that they did, in fact, unreasonably interfere with
17 the enjoyment of life and property on each of the dates involved here.

18 XIII

19 The Board finds further, however, the respondent did not prove
20 that the odors in question had a substantial adverse impact on public
21 health.

22 XIV

23 Prior to being leased by Rande Kummer, the farm land on the DNR
24 tract involved in this case was in a severely degraded condition.
25 Application of the chicken manure from National Foods as fertilizer

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 has built up the land and resulted in greatly improved productivity.

2 Following spring fertilizing, Kummer has grown barley and corn
3 with excellent results, and indications are that the chemistry of the
4 soil may now permit alfalfa to be planted for the 1986 crop year.
5 Soil tests taken this fall will determine whether fertilizer usage
6 should be cut back or changed. The high nitrogen content of chicken
7 manure may no longer be needed.

8 But, analysis to date does not show that the fertilizing program
9 of the past two years has resulted in any over application of
10 fertilizer. Representatives of both the Soil Conservation Service
11 (which provides technical advice in such matters) and the land
12 managing agency, DNR, praised the Kummer operation for the land
13 rehabilitation and production which have been achieved.

14 XV

15 The practices followed by Rande Kummer have been economically
16 feasible. It is cheaper for him to store manure and then plough large
17 quantities of it in at once than to spread and till each load as it
18 arrives from the chicken farm.

19 The latter approach--advocated by SCAPCA--may also be economically
20 feasible in some circumstances. But such a routine was a practical
21 impossibility with the cropping pattern adopted by Kummer for the last
22 two years.

23 Manure simply cannot be ploughed in where fields have a growing
24 crop on them. The only available time for such activity, if grain is
25 planted fence-to-fence, is in the spring before planting and in the

1 fall after harvest. The evidence was that customary land usage in the
2 area leaves very little ground in summer fallow. Locales where daily
3 spreading and tilling could occur during the growing season are
4 severely limited.

5 Moreover, spreading and tilling cannot be carried on in Spokane
6 County in the winter because of frozen earth and run-off problems.

7 XVI

8 There are presently three sizable chicken farms in Spokane County
9 (the local area), all of them now owned by National Food Corporation.
10 Each of these operations uses a different approach to manure
11 disposal. One hauls it to the Mica landfill for disposal. Another
12 trucks it out of the county where it is stored in pits prior to being
13 used as a feed and fertilizer. The third is the Deer Park operation.

14 The method in each case is influenced by the geographical location
15 of the farm. The hauling distance is too long for the Deer Park farm
16 to use the sites used by either of the other two farms. Thus, there
17 is no customary practice as to disposal in the local area.

18 Moreover, there seems to be no precedent for the storage of
19 chicken manure on such a massive scale as practiced by Rande Kummer.

20 XVII

21 The most severe odors result from anaerobic conditions in wet
22 manure. So-called "wet" manure systems involve the addition of water;
23 storage and handling is in a kind of slurry form. The "dry" system
24 inaugurated by National Food in 1984 involves the removal of manure
25

1 from the laying house with only the natural occurring moisture content.

2 This "dry" manure does not present the same odor control problem
3 on removal from the chicken farm as has the wet manure. Absent rain,
4 such "dry" manure, within several days after its delivery to an
5 open-air site, will form an outer crust which will seal in most of the
6 aroma. Thereafter, really strong odors are likely only when the pile
7 is opened for spreading, exposing moist manure underneath or when it
8 rains hard enough to saturate the crust. Accordingly, the storage of
9 such manure in open piles, even very large ones, does not present an
10 unacceptable odor potential in an agricultural area, if the piles are
11 located so as to minimize the likelihood that the smell will disturb
12 residential properties.

13 XVIII

14 Sites two and four on Kummer's leased acreage are in a depression
15 in the landscape, remote from residences, buffered by trees and
16 located where prevailing winds blow away from the nearest homes.

17 Given the unusual situation involving a degraded acreage needing
18 large amounts of manure to rehabilitate it, the testimony of
19 agricultural experts, including Dr. Hermanson, uniformly supported the
20 appropriateness of Kummer's stockpiling program at these locales.

21 Sites one and three, however, were not so thoughtfully selected.
22 Site three was apparently only begun in August of 1984 when space
23 became short on the DNR tract. Site one was begun in September and
24 intended from the outset to last only a short time until it could be
25 ploughed into the, then available, north field. Neither of these

1 sites was appropriate from the odor control standpoint.

2 XIX

3 Any Conclusion of Law which is deemed a Finding of Fact is hereby
4 adopted as such.

5 From these Findings of Fact the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 The Board has jurisdiction over these persons and these matters,
9 Chapters 43.21B and 70.94 RCW (the State Clean Air Act).

10 II

11 The seven notices of penalties at issue assert violations of
12 Article VI, Section 6.04 of SCAPCA Regulation I and WAC 173-400-040(5).

13 Article VI, Section 6.04 states:

14 Section 6.04 Odors and Nuisances

15 A. Effective control apparatus and measures shall be
16 installed and operated to reduce odor-bearing gases
and particulate matter emitted into the atmosphere to
a reasonable minimum.

17 B. The Board or Control Officer may establish
18 reasonable requirements that the building or
19 equipment be closed and ventilated in such a way that
all the air, gas, and particulate matter are
effectively treated for removal or destruction of
20 odorous matter or other air contaminants before
emission to the atmosphere.

21 WAC 173-400-040(5) states:

22 Any person who shall cause or allow the generation of
23 any odor from any source which may unreasonably
24 interfere with another property owner's use and
25 enjoyment of his property must use recognized good
practice and procedures to reduce these odors to a
reasonable minimum.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 We interpret the "reasonable minimum" in both regulations to be a
2 level at which unreasonable interference with the use and enjoyment of
3 another's property does not occur.

4 III

5 However, the generation of some odors, otherwise violations, is by
6 statute removed from the coverage of the State Clean Air Act. RCW
7 70.94.640, adopted in 1981, creates an agricultural exemption. It
8 reads:

9 70.94.640 Odors caused by agricultural activities
10 consistent with good agricultural practices exempt
11 from chapter. (1) Odors caused by agricultural
12 activity consistent with good agricultural practices
13 on agricultural land are exempt from the requirements
14 of this chapter unless they have a substantial
15 adverse effect on public health. In determining
16 whether agricultural activity is consistent with good
17 agricultural practices, the department of ecology or
18 board of any authority shall consult with a
19 recognized third-party expert in the activity prior
20 to issuing any notice of violation.

21 (2) Any notice of violation issued under this
22 chapter pertaining to odors caused by agricultural
23 activity shall include a statement as to why the
24 activity is inconsistent with good agricultural
25 practices, or a statement that the odors have
26 substantial adverse effect on public health.

(3) In any appeal to the pollution control
hearings board or any judicial appeal, the agency
issuing a final order pertaining to odors caused by
agricultural activity shall prove the activity is
inconsistent with good agricultural practices or that
the odors have a substantial adverse impact on public
health.

(4) If a person engaged in agricultural activity
on a contiguous piece of agricultural land sells or
has sold a portion of that land for residential
purposes, the exemption of this section shall not
apply.

(5) As used in this section:

(a) "Agricultural activity" means the growing,
raising, or production of horticultural or
viticultural crops, berries, poultry, livestock,

1 grain, mint, hay, and dairy products.

2 (b) "Good agricultural practices" means
3 economically feasible practices which are customary
4 among or appropriate to farms and ranches of a
5 similar nature in the local area.

6 (c) "Agricultural land" means at least five
7 acres of land devoted primarily to the commercial
8 production of livestock or agricultural commodities.

9 IV

10 On the record before us, we conclude that creation and use of
11 sites two and four fell within the "good agricultural practices"
12 exemption and that, therefore, any odors from those sites would not
13 properly be the subject of civil penalties imposed under chapter 70.94
14 RCW.

15 That alternative methods might also constitute good agricultural
16 practices does not affect our decision. The practices involved at
17 these sites were economically feasible and, though not customary, were
18 appropriate to the particular farm.

19 V

20 We decide, however, that the creation and use of sites one and
21 three do not qualify as "good agricultural practices" and that the
22 odors from those sites must be evaluated under Section 6.04 of SCAPCA
23 Regulation I and WAC 173-400-040(5).

24 Our conclusion is that these regulations were violated on
25 September 5 and 11, 1984, by odors emanating from one or both of these
26 sources.

27 VI

There is no proof in the record linking any of the ill-effects of

1 the odors to any particular manure pile. There is no basis,
2 therefore, for assessing a violation for each pile discovered on
3 inspection. Each may have been a separate odor source, but there is
4 no evidence that odors sufficient to constitute a separate violation
5 emanated from each.

6 We conclude that only a single violation of the regulations cited
7 was shown for each of the days in question.

8 VII

9 We further conclude that the requirement for any notice of an
10 agricultural odor violaton to "include a statement as to why the
11 activity is inconsistent with good agricultural practices" was
12 fulfilled by the language of the regulatory order which accompanied
13 the notices in this case. While not a model of explanatory clarity,
14 the statements there calling for spreading and tilling in place of
15 stockpiling are minimally sufficient to meet the procedural
16 requirements of the statute.

17 VIII

18 The terms of the regulatory order were stayed on appeal by virtue
19 of RCW 70.94.223. While the provisions of that order, as to
20 non-exempt sources, appears appropriate under RCW 70.94.141, the
21 manure piles have long since been removed and the commands of the
22 order have been rendered moot.

23 IX

24 The State Clean Air Act is a strict liability statute. The
25 appropriate analogies for analyzing civil responsibility for its

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 violation are from tort law. Rande Kummer is liable in his individual
2 capacity and the fact that he may have been the employee of a
3 corporation does not affect his personal liability.

4 X

5 The liability of National Food presents a more difficult
6 question. Rande Kummer was not National Food's employee. As to
7 National Food, he occupies the position of an independent contractor.
8 However, the traditional insulation of an employer from liability for
9 harm to third persons by an independent contractor does not
10 automatically follow. See Jackson v. Standard Oil of California, 8
11 Wn. App. 83, 505 P.2d 139 (1972).

12 XI

13 National Food, by maintaining 180,000 chickens at Farm Number 2
14 near Deer Park has created conditions which involve a high degree of
15 risk that excessive odors will result from handling the large
16 quantities of manure that must inevitably be anticipated. The
17 activity is similar to those traditionally classified as especially,
18 peculiarly or inherently dangerous.

19 In such circumstances, responsibility for harmful results which
20 flow from a failure to take special precautions should not, we
21 believe, be delegable. The entity which creates the risk should not
22 be insulated from liability by the simple expedient of handing the
23 problem to someone else.

24 Accordingly, we conclude that National Food's actions are
25 sufficiently connected causally to the violations which occurred as

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-249, et al.

1 make its joint liability for their civil consequences proper. This
2 case differs from American Transport v. PSAPCA, PCHB No. 84-266 (June
3 12, 1985), in that here "air pollution" was caused and harmful
4 consequences were experienced. See RCW 70.94.030(2), RCW 70.94.040.
5 The penalties are in the nature of liquidated damages for injury to
6 the public.

7 XII

8 In reaching these conclusions, we decide only questions under the
9 State Clean Air Act. We intimate no opinion on any matters concerning
10 water pollution or health issues separate from odors.

11 We note that the legislature in trying to encourage productivity
12 on rural lands has expressly determined that certain activities which
13 generate odors in excess of the general applicable standards must be
14 tolerated. We have simply attempted to apply this legislation in
15 accordance with the spirit in which it was written.

16 XIII

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby
18 adopted as such.

19 From these Conclusions of Law the Board enters this
20
21
22
23
24
25

ORDER

1. Notices of Violation Numbers 3580, 3584, and 3585 are reversed because the activities involved were exempt from regulation under the State Clean Air Act.

2. Notices of Violation Numbers 3579 and 3581 are sustained insofar as they form the basis for a single violation on September 5, 1984.

3. Notices of Violation Numbers 3582 and 3583 are sustained insofar as they form the basis for a single violation of September 11, 1984.


4. Two civil penalties aggregating \$500 are sustained, one for the violation on September 5, 1984, and the other for the violation on September 11, 1984. All other civil penalties at issue herein are reversed.

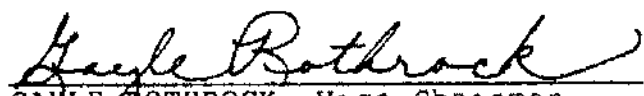
5. The appeal of the Regulatory Order issued on September 12, 1984, is dismissed as moot.

DATED this 10th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

 10/9/85
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


GAYLE ROTHROCK, Vice Chairman